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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 35305

PETITION OF ARKANSAS ELECTRIC COOPERATIVE CORPORATION
FOR A DECLARATORY ORDER

PETITION OF
ARKANSAS ELECTRIC COOPERATIVE CORPORATION
FOR A STAY

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September 30, 2010

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Arkansas Electric Cooperative Corporation ("AECC") 1/, pursuant to 49 USC § 721(b) (4) and 49 CFR § 1117.1, petitions the Board to issue an order enjoining BNSF Railway Company ("BNSF") from enforcing Tariff 6041-B, Items 100 and 101 (the "Tariff") until the Board issues its decision on the merits in this matter. Unless stayed, the Tariff will become effective on October 1, 2010.

AECC initially sought a stay of the Tariff at the time it filed its petition for declaratory order, but withdrew that request when BNSF announced that it was suspending

1/ AECC is authorized to say that this Petition is supported by American Public Power Association, Edison Electric Institute, and National Rural Electrical Cooperative Association.

the Tariff voluntarily. However, BNSF's voluntary suspension of the Tariff expires on October 1, 2010.

Before filing this petition, AECC requested that BNSF voluntarily extend the suspension of the Tariff until the Board issues its decision on the merits, but BNSF declined to do so. See Exhibits A and B attached hereto. Thus, BNSF intends to resume its unilateral implementation of its coal dust requirements before the Board decides whether the Tariff constitutes an unreasonable rule or practice in violation of 49 USC § 10702.

ARGUMENT

In its Decision instituting this proceeding, the Board said:

Under 5 U.S.C. 554(e), the Board has discretionary authority to issue a declaratory order to terminate a controversy or remove uncertainty. The issues raised by AECC and BNSF merit further consideration. A declaratory order proceeding is thus instituted in this proceeding.

Arkansas Electric Cooperative Corporation – Petition For Declaratory Order, FD 35305, served Dec. 1, 2009, at p. 3. For BNSF to implement its Tariff before the Board has terminated the controversy and removed the uncertainty regarding the legality of the Tariff directly disregards the Board's determination that these matters "merit further consideration."

Under 49 USC § 721(b) (4), 2/ the Board may issue a preliminary injunction "when necessary to prevent irreparable harm." To obtain an injunction, a petitioner must show: "(1) substantial likelihood of success on the merits; (2) irreparable harm in the absence of the requested relief; (3) issuance of the order will not substantially harm other parties; and

2/ Western Coal Traffic League (WCTL), in a separate motion being filed today, seeks a stay of the Tariff as a "housekeeping" matter. AECC supports WCTL's motion.

(4) granting the relief is in the public interest.” DeBruce Grain Inc. v. Union Pacific RR, 2 S.T.B. 773, 775 n.3 (1997) (citing Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977)).

The record in this proceeding is complete, and it establishes, among other things, that:

1. Contrary to BNSF’s claim, coal dust is not a “particularly pernicious” ballast foulant that threatens to cause severe disruption of PRB coal transportation if not eliminated; coal dust is a ballast foulant like many others that can and should be dealt with through proper maintenance practices.
2. Board approval of the Tariff would lead to reduced maintenance efforts by BNSF that would increase the risk of service disruptions such as occurred on the Joint Line in 2005, which were caused by BNSF’s poor maintenance practices.
3. BNSF’s monitoring system measures airborne dust that blows away from the track, and does not measure with reasonable accuracy the amount of coal dust that a train deposits on the track.
4. BNSF seeks to impose expensive mitigation requirements on all PRB coal trains, even though its own data show only 14% of trains violating its proposed coal dust standard.
5. BNSF’s own maintenance and operating practices are the actual cause of much of the coal deposited by PRB coal trains on the Joint Line ballast, yet BNSF seeks to impose the entire responsibility for dust suppression on PRB coal shippers.

Thus, there is a very substantial likelihood that the Tariff is unreasonable in violation of 49 USC § 10702.

In refusing to extend the suspension of its Tariff voluntarily, BNSF claimed that, so far, “BNSF has not established any specific measures to enforce compliance with its coal dust emission standards.” See Exhibit B. Presumably BNSF means that letting the Tariff go into effect would not cause irreparable injury because BNSF will not impose any penalties at this time for violation of the Tariff. The argument is disingenuous.

BNSF has made clear that if shippers do not meet the dust suppression requirements of the Tariff, BNSF will impose “enforcement measures”, which “would be set out in separate notices and they would be limited [sic] to circumstances of inadvertent or intentional non-compliance.” BNSF Opening Argument, at 26 (emphasis added). BNSF has also made clear that imposition and severity of the penalties for inadvertent and intentional violations would “turn on individual shippers’ good faith intention to comply with the coal dust emission standards.” Id. Thus, as of October 1st, a shipper subject to the Tariff knows that if it fails to satisfy BNSF as to its “good faith intention to comply” with the Tariff, then within as little as 60 days it can be subjected to penalties ranging from a monetary penalty (a “special handling charge for the non-compliant coal trains”) to a refusal “to provide service”. Id. at 27.

Presumably, BNSF believes that if PRB coal shippers are forced to operate with that sword of Damocles hanging over their heads, many will knuckle under and comply with the Tariff rather than bear the risk of what would happen if the Board does not disapprove the Tariff in its decision on the merits. The waste of resources from attempting to comply with the Tariff certainly constitutes irreparable injury.

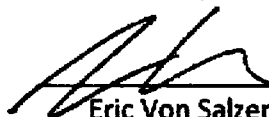
In contrast, BNSF would not be substantially harmed if the Board enjoins the Tariff until the Board’s decision on the merits. This would simply maintain the status quo, requiring BNSF to continue to provide transportation service for conventional coal cars as it has been doing for decades.

Enjoining the effectiveness of the Tariff would also serve the public interest by protecting individual shippers from the requirement to waste large sums of money uselessly spraying surfactants on coal cars. Enjoining the Tariff would continue the status quo in the

vitally important PRB transportation corridors until the Board is able to decide this case in an orderly manner.

WHEREFORE, the Board should enter an order suspending the effectiveness of
Tariff 6041-B, Items 100 and 101, until the Board issues its decision on the merits in this case.

Respectfully submitted,



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September 30, 2010

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September 27, 2010

Via email to ssipe@steptoe.com

Samuel M. Sipe, Jr., Esq.
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036-1795

RE: Petition of Arkansas Electric Cooperative Corporation For a
Declaratory Order, STB Finance Docket No. 35305

Dear Sam,

BNSF Railway (BNSF) has announced that its coal dust tariff will take effect on October 1, 2010, unless disapproved by the Surface Transportation Board (STB) before then. Given that the Board has yet to issue its ruling, Arkansas Electric Cooperative Corporation (AECC) requests that BNSF voluntarily suspend the effective date of its tariff until the effective date of the STB's decision ruling on the merits.

We would appreciate your prompt response to this request. AECC reserves the right to ask the STB to stay the tariff if BNSF does not suspend it voluntarily.

I am authorized to say that Ameren and Western Coal Traffic League join in this request.

You can reach me by email at vonsalz@aol.com or by telephone at (910) 235-5274 (home/office), or (910) 986-1513 (mobile).

Thank you for your prompt attention.

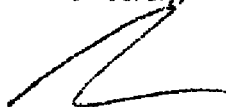
MCLEOD, WATKINSON & MILLER

Samuel M. Sipe, Jr., Esq.

September 27, 2010

Page 2

Sincerely,

A handwritten signature in black ink, consisting of a stylized 'E' followed by a horizontal line.

Eric Von Salzen

cc: Mr. Steve Sharp, AECC
Alex Menendez, Esq.
Sandra L. Brown, Esq.
Kelvin J. Dowd, Esq.
John H. Leseur, Esq.
C. Michael Loftus, Esq.,
Frank J. Pergolizzi, Esq.

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EXHIBIT B

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September 29, 2010

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RE: Petition of Arkansas Electric Cooperative Corporation For A
Declaratory Order, STB Finance Docket No. 35305

Dear Eric:

I am responding to your September 27, 2010 letter in which you request that BNSF Railway Company ("BNSF") suspend its coal dust emissions standards until the effective date of a decision by the STB in the above-referenced Finance Docket.

BNSF does not believe that any further delay in the effective date of its coal dust standards beyond October 1, 2010 is necessary or appropriate. The evidentiary record in this proceeding has been closed for almost 4 months, and we expect that the Board will issue a decision soon. In addition, as you know, BNSF has not established any specific measures to enforce compliance with its coal dust emissions standards. BNSF has also committed to provide at least 60 days notice before applying enforcement measures against any common carrier shipper that is not in compliance with the standards. If BNSF determines that it needs to establish or publish enforcement measures to ensure compliance with its standards, there will be ample opportunity for any affected shippers to seek the Board's intervention if they wish to do so.

Sincerely,

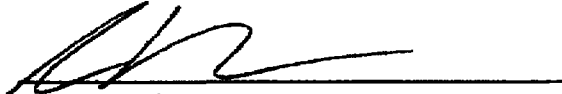


Samuel M. Sipe, Jr.

cc: Alex Menendez
Sandra L. Brown
Kelvin J. Dowd
John H. LeSeur
C. Michael Loftus
Frank J. Pergolizzi

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of September, 2010, I caused the foregoing
to be served electronically on all parties of record in this proceeding.


Eric Von Salzen